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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 580

S. B. LAWRENCE ET AL., Appellants,

VS.

STATE TAX COMMISSION ET AL.,

STATEMENT OF JURISDICTION.

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STATEMENT OF JURISDICTION.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Appellants submit, in compliance with Rule 12, Revised Rules of the Supreme Court of the United States, adopted June 5, 1928, the following statement of the basis of this Court's jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of Mississippi.

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, being Section 344, Judicial Code, U. S. Code, Ann. Title 28.

B.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL

The decree of the Supreme Court of the State of Mississippi, affirming the judgment of the Chancery Court of the First Judicial District of Hinds County, Mississippi, appealed from, was entered November 9, 1931, R. 28.* 137 So. 9503.

The petition for appeal was presented and allowed on the 8th day of December, 1931. R. 43-51.

C.

NATURE OF THE CASE AND RULING BELOW

Chapter 124, extraordinary session, Mississippi legislature, 1928, being Section 5027, Mississippi 1930 Code, contains the following language:

> "5027. Imposition of the tax. There is hereby assessed and levied to be collected and paid as hereinafter provided for the calendar year 1930 and for each calendar year thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates: On the first $2000.00 or taxable income, or any part thereof, at the rate of two and one-half per centum; on the next $3000.00 of taxable income, or any part thereof, at the rate of three and one-

*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State and on file with the Clerk of the Court. The record has not yet been printed.

half per centum; on the next $10,000.00, or any part thereof, at the rate of four and one-half per centum; on all taxable income in excess of $15,000.00, at the rate of five and one-half per centum."

The entire chapter will be found in Appendix I hereto.

Paragraph (a), Section 5033, Mississippi 1930 Code, being Chapter 32, extraordinary session, Mississippi legislature 1928, contains the following language:

"55033. Gross income defined.—For the purposes, except as otherwise provided for non-residents, the term gross income:

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or the use of or any interest in such property, also interest, rent, dividends, securities or other transaction of any business carried on for gain or profit, or gains or profits, and incomes derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty-five per centum or less, the income may be included for taxation in less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received."

Subdivision (11) of Paragraph (b) of said Section 5033 contains the following language:

> "(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising."

The entire section will be found as part of Appendix I to this statement.

S. B. Lawrence, a citizen and resident of Jackson, in the First Judicial District of Hinds County, Mississippi, in the year 1929, as well as in prior and subsequent years, was engaged in the construction of roads, bridges and highways in the states of Mississippi, Alabama, Louisiana and Tennessee. He made such a profit wholly in the State of Tennessee as that if liable for income tax to the State of Mississippi thereupon, he was indebted to the State of Mississippi for approximately $2250.00. Not having included in his gross income for the year 1929, income earned in the State of Tennessee in the construction of highways therein, the Tax Commissioner of the State of Mississippi, under Section 5050, Mississippi 1930 Code, which section will be found in the appendix hereto, made an assessment against him therefor.

Under Section 5056, Mississippi 1930 Code, which section will be found in the appendix, he applied to the Tax Commissioner for a revision of the tax assessed against him. The Tax Commissioner, however, confirmed the assessment against the appellant. Whereupon, under Section 5057, Mississippi 1930 Code, which will be found in the appendix hereto, he applied to the Mississippi State Tax Commission

for a rehearing, R. 2, wherein he specifically set up that the act in question would violate the Fourteenth Amendment to the Constitution of the United States if susceptible to the construction that the appellant was subject to an income tax on earnings contracted for and earned in carrying on an occupation exclusively beyond the limits of the State of Mississippi. R. 4-5. The action of the Tax Commissioner was affirmed by the Tax Commission. Whereupon, under Section 5057, Mississippi 1930 Code, S. B. Lawrence filed a petition in the Chancery Court of the First Judicial District of Hinds County, Mississippi, requesting a hearing of the case on its merits, accompanied by a bond, approved by the clerk of the court, in a sum double the amount of the controversy, conditioned to pay the judgment of the court.

The petition, R. 1, alleged that in the year 1929, he went into the State of Tennessee entered into certain contracts for the construction of roads therein, wholly within the State of Tennessee; that no part of the contracts was entered into or performed in the State of Mississippi, but that, upon the other hand, such contracts were entered into and performed wholly within the State of Tennessee, where the appellant collected the contract price thereof. That, for the purpose of entering into said contracts and performing the same, he adopted a situs in the State of Tennessee. He therefore alleged that he was not liable for income contracted for and earned in carrying on an occupation wholly beyond the limits of the State of Mississippi in the State of Tennessee. The petition alleged that he had appeared before the Tax Commissioner of the State of Mississippi and the Mississippi State Tax Commission and made all objections, and had done such things as were required of him

under the statute, and alleged that he had met an adverse ruling at the hands of the Commission.

The appellant, in his said petition for rehearing in the Chancery Court of the First Judicial District of Hinds County, Mississippi, specifically set up that said statute violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellant of his property without due process of law and denied to him the equal protection of the law. R. 2-14. At R. 8, the following language is used:

> "Complainant avers that no tax whatever was then and there due, and it was unlawful on the part of the Mississippi State Tax Commission to make said additional assessment against complainant, and it was unlawful on the part of the Mississippi State Tax Commission to deny complainant's petition for a review, but that, on the other hand, said assessment should have been reviewed as prayed for by complainant. That said petition for appeal and review before the entire Commission was filed by the complainant within one year from the date of the notice given to complainant of the assessment of any additional tax.
>
> "Complainant shows unto the court that Section 11, Chapter 132, Mississippi Laws 1924, as amended by Chapter 32, Mississippi Laws 1928, extraordinary session, violates the Fourteenth Amendment to the Constitution of the United States in that the same deprives the complainant of his property without due process of law and denies to him the equal protection of the law."

The appellant further alleged that in carrying on in the State of Mississippi and in the surrounding states, including Tennessee, he was engaged in active competition with domestic and foreign corporations, and that under the act complained of, domestic corporations were not required to include in their gross income income earned wholly beyond the limits of the state, and that, therefore, said statute violated the Fourteenth Amendment to the Constitution of the United States, in that it discriminated against the appellant, an individual, in favor of domestic and foreign corporations. R. 9.

Again, R. 10, the appellant, in his petition for rehearing, challenged the constitutionality of the act in question as being in violation of the Fourteenth Amendment to the Constitution of the United States, in that the same imposed liability upon him for income earned wholly and exclusively beyond the limits of the state in carrying on an occupation entered into in the State of Tennessee, the language being as follows, R. 10:

> "That the legislature of the State of Mississippi is without power and authority to impose and/or collect tax on gains, profits or income derived and earned beyond the limits of the state, and that Section 32, Mississippi legislature, extraordinary session, 1928, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the petitioner of property without due process of law and denies to him the equal protection of the law thereby."

The petition for rehearing, in accordance with the statute, made the proper state officials parties thereto and pray-

ed that a judgment be rendered in accordance with the provisions of the statute, vacating and setting aside the assessment complained of therein. R. 11.

To this petition for rehearing, the Attorney General of the State of Mississippi, for and on behalf of the Mississippi State Tax Commission, filed a demurrer, R. 17.

The matter came on for hearing before the Chancery Court of the First Judicial District of Hinds County, Mississippi. The demurrer filed on behalf of the Mississippi State Tax Commission by the Attorney General of the State of Mississippi was sustained, and a final judgment rendered against appellant and the Fidelity & Deposit Company of Maryland, his surety, for the amount of the tax complained of, R. 19.

S. B. Lawrence and the Fidelity & Deposit Company of Maryland prosecuted an appeal to the Supreme Court of the State of Mississippi by giving a bond for the amount and in the form provided by the statute, R. 20. In the Supreme Court of the State of Mississippi, S. B. Lawrence and the Fidelity & Deposit Company of Maryland, his surety, filed an assignment of error, wherein it was claimed that Chapter 32, Miss. Laws of 1928, extraordinary session, being an amendment to Section 11, Chapter 132, Miss. Laws of 1924, being Section 5033, Mississippi 1930 Code, as construed and enforced in this case, violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellants of their property without due process of law and denied to them the equal protection of the law. R. 23.

The Supreme Court of the State of Mississippi affirmed the action of the Chancery Court of the First Judicial District of Hinds County, Mississippi, and the Supreme Court of the State of Mississippi, in affirming the judgment against appellants, R. 27, used the following language:

> "The Mississippi State Tax Commission, in accordance with the provisions of the Mississippi statutes on the subject, took steps to assess him with the income tax imposed by law. The appellant appeared before the State Tax Commission and objected to the assessment of the said income tax, contending that he is not subject to the income tax upon money earned outside of the State of Mississippi in the contract above referred to; that the state could not, under the 14th section of the Bill of Rights of the State of Mississippi, or the 14th amendment to the Constitution of the United States, impose liability for income earned as result performing labor or pursuing an occupation beyond the limits of the state, and in the limits of another state. On the hearing, the Tax Commission assessed him with an income tax on the income earned out of the state. The appellant thereupon filed a bill in chancery in accordance with Section 5057, Code of 1930, to review the assessment. He contended that Chapter 32, extraordinary session Mississippi legislature 1928 did not impose liability for income earned wholly out of the State of Mississippi; that if the statute should be so construed and enforced as to impose liability upon him for such income, then the statute would violate the above sections of the Constitution."

Upon the question of discrimination by reason of the

fact that domestic corporations were not required to include gross income earned wholly beyond the limits of the state, the court held that such provision itself was stricken down, and that both individuals and domestic corporations were liable for income earned wholly beyond the limits of the state. Accordingly, judgment was rendered against S. B. Lawrence, appellant, the Fidelity & Deposit Company of Maryland, surety on his bond from the State Tax Commission to the Chancery Court of the First Judicial District of Hinds County, Mississippi, and the Maryland Casualty Company, surety on the bond of both of them to the Supreme Court of the State of Mississippi. Both of said sureties join in this appeal as appellants.

The Supreme Court of the State of Mississippi, in construing its own constitution and statutes, held that a tax could not be imposed merely upon the use or ownership of property. *Thompson vs. Kreutzer*, 112 Miss. 165, 72 So. 891; *Thompson vs. McLeod*, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, Ann. Cas. 1918A, 674.

The tax was not a lieu tax, because under Section 112 of the Mississippi State Constitution, the appellant Lawrence was liable for an ad valorem tax on all property owned by him in the State of Mississippi; said section being found in Appendix II hereto, the same providing that taxation shall be equal and uniform, and that all property shall be assessed at its true value.

In the case of *Chicago, R. I. & P. R. R. Co. vs. Robertson, Rev. Agent*, 122 Miss. 417, 84 So. 449, the court held that Chapter 113, Miss. Laws of 1912, providing for a fixed

charge on the gross receipts of a freight line company in lieu of all taxes on the property of the company used in its business in the state was void as violative of Section 112 of the state constitution. If the income tax complained of had been a property tax, it would have been void under Section 112 of the state constitution aforesaid. See Appendix II. *Thompson vs. Kreutzer*, 112 Miss. 165, 72 So. 891; *Thompson vs. McLeod*, 112 Miss. 383, 73 So. 193.

Money not subject to taxation in Mississippi Code, Sec. 3108, Appendix III.

In the case of *State ex rel. Knox vs. G. M. & N. R. R. Co.*, 138 Miss. 70, 104 So. 689, at page 99, the court used the following language:

> "The question presented for decision in these cases is the validity vel non of the Income Tax Act, (Chap. 132, Laws of 1924), by which a tax is imposed on all but certain excepted net incomes from whatever source derived. The ground on which it is claimed that the act is void is that it is in conflict with the Fourteenth Amendment to the Federal Constitution and with several sections of the State Constitution, to which, when necessary, reference will be hereinafter specifically made.
>
> "As to the provision of Section 112 of the State Constitution, that 'property shall be taxed in proportion to its value,' and 'shall be assessed for taxes under general laws, and by uniform rules, according to its true value:'

"The appellees' contention in this connection is that a tax on income derived from property is a tax on the property from which the income is derived, and, as the tax here imposed is on all income, it was, insofar as it affects income from property, a tax on the property from which the income was derived, which property the Constitution permits to be taxed only in proportion and according to its true value.

"This contention is ruled by *Hattiesburg Grocery Co. vs. Robertson*, 126 Miss. 34, 88 So. 4, 25 A. L. R. 748, wherein this court, after mature consideration, held that a tax on income is an excise and is not a tax on the property from which the income may have been derived. As was there pointed out, a tax on income from property includes some of the elements both of a tax on property and of a tax on persons, and can not be classified as strictly a tax on either alone. Property of itself alone can not produce income, but must be used or dealt with in some way by a person before gain or income can be derived therefrom, and no definition of income, though derived from property, can be framed which does not include the activities of the person by whom it was produced, received or enjoyed.

"A tax, though not eo nomine on property, but which the owner thereof must pay merely because of his ownership of the property, (*Thompson vs. Kreutzer*, 112 Miss. 165, 72 So. 891), or because of a special use of property without reference to whether or not revenue or gain is derived therefrom, (*Thompson vs. McLeod*, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, Ann. Cas. 1918A, 674), is a tax on the property, and should be in proportion and according to the value thereof. *But*

the tax here imposed is not on the ownership or use without gain of property, but is on the revenue which the activities of the owner cause the property to produce. The taxation of such property is universal, and is the basis of most of our privilege taxes."

In other words, the tax imposed by the statute, as construed by the Supreme Court of the State of Mississippi, is an excise, occupation or privilege tax on the activities of the owner, which activities of the owner took place wholly and exclusively beyond the limits of the State of Mississippi, in the State of Tennessee, where contracts for the construction of highways were entered into, executed and performed, and the compensation therein collected, and it is this income contracted for and earned in carrying on an occupation wholly beyond the limits of the State of Mississippi, in the State of Tennessee, that is taxed as an excise or occupation tax. Such is the construction placed upon the act by the Supreme Court of the State of Mississippi, which is binding upon this court. *Bandini Pet. Co. vs. Superior Court of the State of California,* October term, 1931, No. 43, decided Nov. 23, 1931, Advance Sheets, 76 L. Ed. 123; *Lindsey vs. Natural Carbonic Gas Co.,* 220 U. S. 61, 73, 55 L. Ed. 369, 375. Such construction is part of the statute, and is binding on this Court. *Farmers Irrigation Dist. vs. Nebraska,* 244 U. S. 325, 61 L. Ed. 1168; *New York ex rel. New York & Queens Gas Co., vs. McCall,* 245 U. S. 345, 62 L. Ed. 337; *La Tourette vs. McMaster,* 248 U. S. 465, 63 L. Ed. 362; *Vigliotti vs. Pa.,* 258 U. S. 403, 66 L. Ed. 686; *Supreme Lodge vs. Meyer,* 265 U. S. 30, 68 L. Ed. 885; *Supreme Lodge vs. Eiser,* 265 U. S. 41, 68 L. Ed. 891.

D.

(1) CASES SUSTAINING JURISDICTION

The statute of the State of Mississippi complained of violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived appellants of their property without due process of law and denied to them the equal protection of the law, in that the statute as construed and enforced in this case, imposed liability upon the appellant for an excise, occupation or privilege tax for income contracted for and earned in following an occupation wholly and exclusively beyond the limits of the State of Mississippi, in the State of Tennessee. Consistent with the Fourteenth Amendment to the Constitution of the United States, a state may not tax persons, property or an occupation, or the income earned therefrom, beyond the limits of the state. Cleveland P. & A. R. Co. vs. Pa., 15 Wall. 300 319, 325, 21 L. Ed. 179, 186, 188; *Louisville & J. Ferry Co., vs. Kentucky*, 185 U. S. 385, 396,47 L. Ed. 513, 518, 23 Sup. Ct. Rep. 463; *Old Dominion S. S. Co. vs. Virginia*, 198 U. S. 299, 49 L. Ed. 1059, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100; *Delaware, L. & W. E. Co. vs. Pennsylvania*, 198 U. S. 341, 356, 49 L. Ed. 1077, 1083, 25 Sup. Ct. Rep. 669; *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; *Western U. Teleg. Co. vs. Kansas*, 216 U. S. 1, 38, 54 L. Ed. 355, 370, 30 Sup. Ct. Rep. 190; *International Paper Co. vs. Massachusetts*, 246 U. S. 135, 142, 62 L. Ed. 634, 639, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617; *Rees' (Hans) Sons vs. North Carolina*, 283, U. S. 123, 75 L. Ed. 879; *Farmers' Loan & Trust Co. vs. Minnesota*, 280 U. S. 204, 74 L. Ed. 371; *Safe Dep. & Trust Co.*, 280 83, 74 L. Ed. 180; *Nat'l Life Ins. Co. vs. United States*, 277 U. S. 508, 72 L. Ed. 968; *Brooke vs. City*

of Norfolk, 277 U. S. 27, 72 L. Ed. 767; *Rhode Island Hospital Trust Co. vs. Doughton, Comm'r*, 270 U. S. 69, 70 L. Ed. 475; *Frick vs. Commonwealth of Pennsylvania*, 268 U. S. 473, 69 L. Ed. 1058; *St. Louis Cotton Compress Co. vs. State of Arkansas*, 260 U. S. 346, 67 L. Ed. 297; *Shaffer vs. Carter*, 252 U. S. 37, 64 L. Ed. 445; *Provident Life Assurance Soc. vs. Commonwealth of Kentucky*, 239 U. S. 103, 60 L. Ed. 167; *Hawley vs. City of Malden*, 232 U. S. 1, 58 L. Ed. 477; *Allgeyer vs. State of Louisiana*, 165 U. S. 578, 41 L. Ed. 832; *C. P. & A. R. R. Co. vs. Pennsylvania*, 82 U. S. 300, 21 L. Ed. 179; Opinion of Justice, (Nov.) 149 Atl. 321.

(2) *Since an occupation carried on wholly beyond the limits of the state may not be taxed at the source, the income arising therefrom may not, consistent with the Fourteenth Amendment to the Constitution of the United States, be taxed.* *Gillespie vs. State of Oklahoma*, 257 U. S. 501, 66 L. Ed. 338; *Indian Territory Illuminating Oil Co. vs. Oklahoma*, 240 U. S. 522, 60 L. Ed. 779, 36 Sup. Ct. Rep. 453; *Pollock vs. Farmers' Loan & T. Co.*, 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673; *Moseley vs. State*, 115 Tenn. 57 86 S. W. 714; *Brushaber vs. Union P. R. Co.*, 240 U. S. 1, 60 L. Ed. 493, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *William E. Peck & Co. vs. Lowe*, 247 U. S. 163, 62 L. Ed. 1049, 38 Sup. Ct. Rep. 432; *Eisner vs. Macomber*, 252 U. S. 189, 64 L. Ed. 521, 9 A. L. R. 1570, 40 Sup. Ct. Rep. 189; *Evans vs. Gore*, 253 U. S. 245, 64 L. Ed. 887, 40 Sup. Ct. Rep. 550.

Each of the foregoing cases is an authority that this court has jurisdiction of the present case under Section 237 (a) Judicial Code, being Section 344 U. S. C. A.

(3) In the case of *State ex rel. Knox, Attorney General, vs. R. R. Co.*, 138 Miss. 70 Supra, in justifying its hold-

ing that it could tax income, whether earned within or without the state, the Supreme Court of the State of Mississippi referred to *Maguire vs. Trefry*, 253 U. S. 12, 64 L. Ed. 738.

In that case, Miss Emily Maguire was a resident of Boston, Mass. She was the beneficiary of a trust estate consisting of intangibles in the hands of a trustee in the State of Pennsylvania, from which trust estate she acquired certain income. There are two differences between that case and the one before the court. In that case, the securities were intangibles, and the doctrine of mobilia sequuntur personam applied. In other words, the situs of the intangibles followed the domicile of the beneficiary, which was in Massachusetts. The second difference is that the tax was not an excise tax, but a property tax according to the laws of the State of Massachusetts. *Tax Commission vs. Putnam*, 227 Mass. 522, L. R. A. 1917F, 806, 116 N. E. 804.

This court has recently had occasion to limit the application of the case in *Safe Deposit & Trust Co. vs. Virginia*, 280 U. S. 83, 74 L. Ed. 180, in respect to which the following language was used by this Court:

> "The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See *Maguire vs. Trefry*, supra."

That is to say, the tax imposed by the State of Massachusetts was intended as the equivalent of a property tax upon the fair value of any interest which the appellant had in the securities measured by the income arising therefrom.

Suppose, however, that the appellant, though living in Massachusetts, had each day gone into Pennsylvania and followed some occupation, such as a day laborer, clerking in a store or selling goods. It could not be contended that an excise, privilege or occupation tax could have been imposed upon her for performing manual labor in another state. And the case of *Maguire vs. Trefry*, supra, is not an authority for such position. As a matter of fact, we have the converse of the proposition in the Supreme Court of the State of Massachusetts in the case of *Hutchins et al. vs. Commissioner of Taxation*, 172 N. E. 605. In that case, a trust estate was situated in the State of New York. The trustees, however, resided in the State of Massachusetts. The Supreme Court of Massachusetts held that the income was not subject to taxation, using the following language:

> "In our opinion, it follows that there was no jurisdiction to levy the taxes on the gains of the two New York trusts. For discussion of cognate questions, see *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194, 202, 26 Sup. Ct. Rep. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Frick vs. Pennsylvania*, 268 U. S. 473, 488, 489, 45 Sup. Ct. Rep. 603, 69 L. Ed. 1058, 42 A. L. R. 316; *Rhode Island Hospital Trust Co. vs. Doughton*, 270 U. S. 69, 46 Sup. Ct. Rep. 256, 70 L. Ed. 475, 43 A. L. R. 1347; *Blodgett vs. Silberman*, 277 U. S. 1, 12, 18, 48 Sup. Ct. Rep. 410, 72 L. Ed. 749; *Brooke vs. Norfolk*, 277 U. S. 27, 29, 48 Sup. Ct. Rep. 422, 72 L. Ed. 767."

The Supreme Court of the State of Mississippi likewise cited, 138 Miss. 70, at page 108, the case of *Shaffer vs. Carter*, 252 U. S. 37, 64 L. ed. 445. That case, however, holds just the opposite, since it is expressly announced therein that

the power of a state to impose liability for an excise tax is confined to the boundary of the state itself.

(4) *Appellants' petition alleges, and the demurrer admits that in the construction of highways in Mississippi, Tennessee and other states, the appellant Lawrence was in direct competition with individuals and domestic and foreign corporatinos; that no liability could be imposed upon foreign corporations, and the legislature had undertaken to relieve domestic corporatoins from the necessity of including as part of gross income that earned wholly beyond the limits of the state. Such classification was arbitrary, discriminatory and rendered the statute unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States, for the reasons hereinbefore set out.*

W. A. Frost vs. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483; *Quaker City Cab Co. vs. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927; *Southern Railway Co. vs. Green*, 216 U. S. 400, 54 L. Ed. 536; *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 64 L. Ed. 989; *Chalker vs. Railway Co.*, 249 U. S. 522, 63 L. Ed. 748.

Assuming the soundness of the court's position that income earned from an occupation beyond the limits of the state, was subject to an excise tax on the part of the State of Mississippi, which of course is denied, the discrimination is not removed, nor is the arbitrary nature of the tax alleviated or the statute rendered any less in conflict with the Fourteenth Amendment to the Constitution of the United States by the holding of the court that both domestic corporations and individuals were liable for the tax, since the petition alleged and the demurrer admitted that for the year 1929, the Tax Commission had knowingly, uniformly and intentionally relieved domestic cor-

porations from the liability. R. 9-10. The Tax Commission, the authoritative taxing body, acting for and on behalf of the State, for the year 1929 relieved domestic corporations from the liability. Appellants have no authority, nor has the Supreme Court of the State of Mississippi any authority to impose the same or compel the payment of the tax or imposition of liability therefor.

In the recent case of *Iowa-Des Moines Nat'l Bank vs. E. R. Bennett, Chairman,* Nos. 15 and 16, docket of this Court, October 1931, opinion by Mr. Justice Brandeis, December 14, 1931, the following language was used:

> "The petitioners' rights were violated, nad the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, pomptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased of their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of Federal law, can not be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co. vs. Board of Revision,* supra; *Greene vs. Louisville & Interurban R. R. Co.,* 244 U. S. 499, 514-518; *Chicago Great Western Railway Co. vs. Kendall,* 266 U. S. 94, 98; *Sioux City Bridge Co. vs. Dakota County,* supra. Nor may he be remitted to the necessity

of awaiting such action by the state officials upon their own initiative. *Montana Nat'l Bank vs. Yellowstone County*, supra."

See, also, dissenting opinion, Supreme Court of the State of Mississippi, present case, R. 31, and cases therein cited.

(5) *The question was properly raised of record, and the imposition of liability on the appellants necessarily involved the question as to whether or not income wholly earned from an occupation contracted for and performed wholly beyond the limits of the state, may consistently with the Fourteenth Amendment to the Constitution of the United States be taxed by the State of Mississippi in this case. It was necessary for the Supreme Court of Mississippi to decide the question adversely to the appellants in order to render the judgment which it rendered.*

Kaukauna Water Power Co. vs. Green Bay & Miss. Canal Co., 142 U. S. 254, 35 L. Ed.1004; *Green Bay & Miss Canal Co. vs. Patten Paper Co.*, 172 U. S. 584, 43 L. Ed. 364; *Dewey vs. City of Des Moines*, 173 U. S. 193, 43 L. Ed. 665; *Murray vs. City Council of Charleston*, 96 U. S. 432, 24 L. Ed. 760; *Schlemmer vs. Buffalo, R. & P. Railway Co.*, 205 U. S. 11, 51 L. Ed. 686; *Detroit F. W. & Belle Isle Railway Co. vs. Osborn*, 189 U. S. 387, 47 L. Ed. 863.

Respectfully submitted,

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APPENDIX I

Chapter 124, Vol. 2, Mississippi Code 1930 Annotated

5027. IMPOSITION OF THE TAX.—There is hereby assessed and levied to be collected and paid as hereinafter provided for the calendar year 1930 and for each calendar year thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates: On the first $2,000.00 of taxable income, or any part thereof, at the rate of two and one-half per centum; on the next $3,000.00 of taxable income, or any part thereof, at the rate of three and one-half per centum; on the next $10,000.00, or any part thereof, at the rate of four and one-half per centum; on all taxable income in excess of $15,000.00, at the rate of five and one-half per centum.

(2) A like tax is hereby imposed to be assessed, collected and paid annually at the rates specified in this section and as hereinafter provided upon and with respect to the entire net income, from all property owned and from every business, trade or occupation carried on in this state by individuals, corporations partnerships, trusts or estates, not residents of the state of Mississippi.

(3) In the case of taxpayers subject to this tax having a fiscal year ending in 1930, the tax shall be determined by:

(2) Computing for a full year the amount of tax due, and considering the exemptions and credits allowed hereunder.

(b) By computing the amount of tax due for a full year, after considering the credit and exemptions allowed herein.

(c) The same ratio of the tax determined under (a) of this paragraph which the number of months in 1929 bear to the total number of months in the fiscal period;

(d) The same ratio of the tax computed under (b) of this paragraph which the number of months in 1930 bear to the number of months in the fiscal period;

(e) The amount of tax due for the fiscal period shall be the sum determined under (c) of this paragraph plus the amount determined under (d) of this paragraph.

1928 Ex. Ses. ch. 24; 1924 ch. 132.

5028. TAX IS ADDITIONAL PERSONAL DEBT.—The tax herein imposed is in addition to all other taxes imposed by law, and every tax in addition to being a tax against the property, business, trade, profession, or occupation, shall also become from the time it is due and payable, a personal debt from the taxpayer liable to pay the same, to the State of Mississippi.

1924 ch. 132.

5031. NET LOSSES.—(a) As used in this section the term net loss, means only net losses resulting in the operation of any trade or business regularly carried on by the taxpayer, including losses sustained from the sale or other

disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business.

(b) If for any taxable year it appears upon the production of evidence satisfactory to the commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year and if the net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year, the deduction in all cases to be made under regulations prescribed by the commissioner with the approval of the governor.

(c) The benefit of this section shall be allowed to members of partnerships and the beneficiaries of any estate or trust, under regulations prescribed by the commissioner with the appoval of the governor.

(d) It appears upon the production of evidence satisfactory to the commissioner, that a taxpayer having a fiscal year beginning in 1929 and ending in 1930 after the adoption of this chapter has sustained a net loss during such fiscal year, such taxpayer shall be entitled to the benefits of this section in respect to the same proportion to such net loss which the entire portion of such fiscal year falling within the calendar year 1930 after said adoption is of the entire fiscal year.

(e) The benefits of this section may be allowed for

a period of three years from the date such loss is sustained, and not thereafter.
1924 ch. 132.

5033. GROSS INCOME DEFINED.—For the purposes except as otherwise provided for non-resident, the term gross income:

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real, or personal growing out of the ownership or the use of or any interest in such property, also interest, rent, dividends, securities or other transactions of any business carried on for gain or profit or gains, or profits, and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty-five per centum or less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received.

(b) The term gross income, does not include the following items which shall be exempt from taxation hereunder:

(1) The proceeds of life insurance policies and contracts paid upon the death of the insured.

(2) The amount received by the insured as a return

of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at maturity or upon surrender of the contract.

(3) The value of property acquired by gift, bequests, devise or descent, but the income from such property shall be included in the gross income.

(4) Interest upon the obligations of the United States or its possessions or securities issued under the provisions of the federal farm loan act of July 17, 1916, or bonds issued by the war finance corporation or the obligations of the state of Mississippi or political subdivisions thereof or of any municipal corporation.

(5) The amounts received through accident or health insurance as compensation for personal injuries or sickness, plus the amount of any damages received for such injuries or such sickness or injury, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

(6) Salaries, wages, and other compensation received from the United States government or officials or employees thereof, including persons in the military or naval forces of the United States.

(7) Income received by any religious denomination or by any institution or trust for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes

or for the enforcement of laws relating to children or animals or for two or more of such purposes if such income be used exclusively for carrying out one or more of such purposes.

(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay an income tax, or dividends from a national bank or state bank organized under the laws of the state of Mississippi.

(9) In the case of taxpayers other than residents, gross income, includes gross income from sources within this state.

(10) In the case of life insurance companies there shall not be included in gross income such portion of any actual premium received from any individual policyholder as is paid back or credited to or treated as an abatement of premium of such policyholder within the taxable year.

(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising.

1918 Ex. Ses. ch. 32.

5034. DEDUCTIONS ALLOWED.—(a) In computing the net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade

or business and including rentals or other payments required to be made as a condition to the continued use or possession for purposes of the trade or business, of property which the taxpayer has not or is not taking title or in which he has no equity; and all necessary expenses incurred by those forced to leave home in order to do the work they are employed to do.

(2) All interest paid or accrued during the taxable year on indebtedness, except interest upon indebtedness for the purchase of tax free bonds, or stock in a national bank or bank organized nuder the laws of the state of Mississippi.

(3) Taxes, other than income taxes, paid or accrued within the taxable year imposed; first by the authority of the United States or any of its possessions; second, by the authority of any state or territory, or any county, school district, drainage or levee district, municipality or other taxing subdivision of any state or territory; third by the authority of any foreign government.

(4) Losses sustained during the taxable year not compensated for by insurance or otherwise, if incurred in trade or business.

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only such transactions in real property or in tangible personal property having an actual situs within the state.

(6) Losses sustained during the taxable year of property not connected with the trade or business if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise.

(7) Debts ascertained to be worthless and charged off during the taxable year.

(8) A reasonable allowance for exhaustion, wear and tear of property used in the trade or business, and depreciation upon buildings based upon their reasonable value on March 16th, 1912, if acquired prior thereto, and upon cost if acquired subsequent to this date.

(9) In the case of timber a reasonable allowance for depletion based upon cost; provided it was acquired prior to March 16th, 1912, the fair market value on that date shall be taken in lieu of cost.

(10) Contributions or gifts made within the taxable year to corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by law to an amount not in excess of ten per centum of the taxpayer's net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the commissioner with the approval of the governor. In the case of a non-resident this deduction shall be allowed only

as to contributions or gifts made to domestic corporations, or to such vocational rehabilitation fund.

(11) Contributions made within the taxable year to religious, charitable, scientific, or educational associations, not incorporated, or to persons for exclusive use for religious, charitable, scientific or educational purposes, to be allowed under regulations and rules made by the commissioner with the approval of the governor, not exceeding ten per centum of the taxpayer's net income during the taxable year, without the benefits of this section; and the benefits of this section must be considered in connection with the preceding section in determining the amount of the deduction under this section and the next preceding section, and shall in no event exceed ten per centum of the taxpayer's net income without the benefits of this and the preceding section, provided further no receipt shall be demanded under such rules and regulations unless the commissioner shall have cause to believe that the deductions claimed under this section is (are) fraudulent.

(12) In the case of insurance companies the net additions required by law to be made within the taxable year to reserve funds.

(13) The sums other than dividends, paid within the taxable year on policy and annuity contracts.

1924 ch. 132.

5056. REVISION BY COMMISSIONER.—A taxpayer may apply to the commissioner for revision of the tax

assessed against him, at any time within one year from the time of the filing of the return or from the date of the notice of the assessment of any additional tax. The commissioner shall grant a hearing thereon and if, upon such hearing, he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts and adjust the computation of the tax accordingly. The commissioner shall notify the taxpayer of his determination and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. If the taxpayer has failed, without good cause, to file a return within the time prescribed by law, or has filed a fraudulent return, or having filed an incorrect return, has failed, after notice, to file a proper return, the commissioner shall not reduce the tax below the amount for which the taxpayer is found to be properly assessed.

After the time for making of the returns by taxpayers in each year has passed the state tax commission shall arrange for hearings at the state capitol and give such notice thereof as may be deemed requisite. The expense of such hearings shall be paid out of funds appropriated for the enforcement of this chapter including the traveling expenses of the members of the commission and its necessary employees. Two members of the state tax commission shall constitute a quorum at such hearings.

1924 ch. 132.

5057. REHEARING.—In all hearings before the commission, under this chapter, oral, documentary and other evidence may be introduced by either party and the

findings of the commission shall be final unless the taxpayer, or the state, by the attorney-general, shall, within thirty days from the date of the receipt of notice of such findings, file a petition in the chancery court of Hinds County, at the seat of government, requesting a hearing of the case on its merits, which petition shall be a concise statement of the facts as contended for by the party dissatisfied with the findings of the commission. If the taxpayer be the party filing said petition it shall be accompanied with a bond, to be approved by the clerk of said court, in a sum double the amount in controversy, conditioned to pay the judgment of the court. On filing such petition the clerk of the court shall give the opposite party (the attorney-general, if the petition is filed by the taxpayer) notice of the proceedings as required by law. The chancery court shall have jurisdiction to hear and determine said cause, on issue joined, as in other cases. If the petition be filed by the attorney-general for the state, and the taxpayer be not a citizen of Hinds County, on the application of the taxpayer, the suit shall be transferred to the county in this state of which the taxpayer is a citizen. Or the attorney-general may file this petition in the first instance in the chancery court of the county of which such taxpayer is a citizen, which court in either case shall have jurisdiction to hear and determine the case on issues joined therein. Either the state or the taxpayer, or both, shall have the right of appeal to the Supreme Court, as in other cases.

1924 ch. 132.

APPENDIX II.

Constitution of the State of Mississippi.

Section 112. Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by unifom rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroads and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county.

APPENDIX III

MISSISSIPPI CODE 1930 ANNOTATED. Chapter 61. REVENUE..

3108. WHAT PROPERTY EXEMPT.—The following shall be exempt from taxation:

. . . . . .

(x) Any and all money on deposit in either national banks, state banks or trust companies, on open account, savings account and time deposit.

1928 ch. 185; 6878; 4251; 3744; 468; 1662; ch. 8 art. 11; ch. 8 art. 2 (1).